

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Melissa Hortman,

Complainant,

vs.

Republican Party of Minnesota,

Respondent.

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
ORDER**

The above-entitled matter came on for an evidentiary hearing on October 11, 2006, before a panel of three Administrative Law Judges: Beverly Jones Heydinger (Presiding Judge), Bruce Johnson, and Kathleen D. Sheehy. The hearing record closed at the conclusion of the hearing that day.

Alan Weinblatt, Attorney at Law, Weinblatt & Gaylord, PLC, 111 East Kellogg Blvd, Suite 300, St. Paul, MN 55101, appeared on behalf of Representative Melissa Hortman (Complainant). Brian McDaniel, Attorney at Law, 13115 Gable Lane, Apple Valley, MN 55124, and Matthew W. Haapoja, Attorney at Law, Trimble & Associates, Ltd., 10201 Wayzata Boulevard, Suite 130, Minneapolis, MN 55305, appeared on behalf of the Republican Party of Minnesota. (Respondent).

**NOTICE**

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

**STATEMENT OF ISSUES**

Did Respondent violate Minn. Stat. § 211B.06 by intentionally participating in the preparation or dissemination of false campaign material that Respondent knew was false or communicated to others with reckless disregard as to whether it was false?

A majority of the panel concludes that the Complainant failed to establish that Respondent violated Minn. Stat. § 211B.06, and therefore the Complaint against it is dismissed.

Based upon the entire record, the panel makes the following:

## FINDINGS OF FACT

1. Melissa Hortman is a member of the Minnesota State House of Representatives representing District 47B. Ms. Hortman was first elected in 2004. She is running for re-election in the November 7, 2006, General Election.

2. Minnesota House District 47B covers portions of Hennepin and Anoka Counties, and includes the cities of Brooklyn Park and Coon Rapids. District 47B is served by the Anoka-Hennepin and Osseo school districts.

3. A main theme of Ms. Hortman's 2004 campaign was the need to lower property taxes for North Metro homeowners while continuing to fully fund schools. Several pieces of campaign literature distributed to residents of District 47B on behalf of Ms. Hortman's 2004 campaign discussed the need to reduce the property tax burden on "North Metro homeowners."<sup>1</sup>

4. School districts have the option to seek additional revenue by going to the voters and having the voters approve an operating referendum or levy. These levy amounts are provided through local property taxes. The amount of referendum revenue that a school district can raise is capped by state law. However, the state does provide equalization aid to help school districts of low or moderate property tax wealth reduce the levy impact of the referendums.<sup>2</sup>

5. On or about April 4, 2005, Representative Hortman proposed, as Chief Author, the adoption of House File 2310 (HF 2310).<sup>3</sup>

6. As written, HF 2310 would have increased the referendum equalization aid amount from \$500 to \$800 per pupil. This would have increased referendum equalization aid statewide by about \$18 million, and lowered property tax levies by the same amount (about \$18 million statewide). HF 2310 would have also increased the maximum amount of referendum revenue that a school district could have by raising the referendum cap from 18.6% to 28% of the formula allowance.<sup>4</sup> With an increase in the referendum cap, property taxes could rise if the voters in the school district approved an increased levy.<sup>5</sup>

7. In 2005, ten school districts already had approved property tax levies that were above the 18.6% referendum caps. For those districts, HF 2310 would have allowed school boards to increase property taxes up to the amount previously approved by the voters.<sup>6</sup> For all other school districts, HF 2310 would

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<sup>1</sup> Testimony of Hortman; Ex. 8

<sup>2</sup> Testimony of Strom and Melcher; Ex. 5 (Sept. 22, 2006, Memo to Hortman from Strom).

<sup>3</sup> Exs. 2 and 3.

<sup>4</sup> Testimony of Strom: Ex. 4.

<sup>5</sup> Ex. 5.

<sup>6</sup> The total amount of property tax increase for those 10 school districts would have been \$7.6 million.

not have automatically raised property taxes absent action by each school district's board to seek a referendum and approval of the levy by voters.<sup>7</sup>

8. Had HF 2310 been enacted as written, the Department of Education estimated that its net effect would have increased statewide property taxes by about \$16 million (\$34 million in increased levies minus \$18 million in additional equalization aid).<sup>8</sup>

9. Had HF 2310 been enacted as written, the section concerning equalization aid would have decreased property taxes for property owners in District 47B, Representative Hortman's legislative district.<sup>9</sup> The Anoka-Hennepin school district would have received equalization aid resulting in property tax reductions of about \$3 million for fiscal year 2007.<sup>10</sup> The Osseo school district would have received equalization aid resulting in property tax reductions of about \$680,000 for fiscal year 2007.<sup>11</sup>

10. Ms. Hortman did not anticipate an excess levy referendum in her district, and in fact there was none. Thus, the property taxes of taxpayers in the Anoka-Hennepin and Osseo school districts would not have been affected by the provision in HF 2310 increasing the referendum caps from 18.6% to 28%. Representative Hortman included that provision in her bill in order to attract support for her bill from legislators for whom increasing the referendum caps was an important constituent issue.<sup>12</sup>

11. HF 2310 did not receive a hearing and was not enacted. However, the 2005 Legislature enacted an omnibus education bill (HF 141) that did increase the equalization aid amount in fiscal year 2007 from \$500 per pupil to \$600 per pupil, and then to \$700 per pupil for fiscal years 2008 and later. The enacted bill also increased the referendum cap from 18.6% to 26%.<sup>13</sup> The Department of Education estimated that the overall effect of the bill would have raised property taxes statewide by approximately \$29 million.<sup>14</sup>

12. During the 2005 legislative session, Representative Erik Paulsen, the Republican Majority Leader in the Minnesota House of Representatives, introduced a bill that would have had the same effect as HF 2310.<sup>15</sup>

13. On or about September 18, 2006, the Republican Party of Minnesota distributed a campaign flyer to residents of House District 47B with the heading: "Two years ago, we said yes to Melissa Hortman . . . but Melissa Hortman has

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<sup>7</sup> Testimony of Strom.

<sup>8</sup> Testimony of Strom and Melcher; Ex. 6.

<sup>9</sup> Testimony of Strom, Hortman, and Peppin.

<sup>10</sup> Testimony of Strom; Ex. 4.

<sup>11</sup> Testimony of Strom; Ex. 11.

<sup>12</sup> Testimony of Representative Hortman.

<sup>13</sup> Testimony of Strom; Ex. 4.

<sup>14</sup> Ex. 5.

<sup>15</sup> Testimony of Peppin.

been saying NO to us ever since.” In the fourth paragraph underneath the heading, the flyer states:

Even though she promised to “*reduce homeowner property taxes*”<sup>16</sup>  
Melissa Hortman failed to introduce even one bill to do so.<sup>17</sup>

At the bottom of the flyer is the following statement: “IT’S TIME TO SAY NO TO MELISSA HORTMAN. SHE’S NOT ON OUR SIDE!”<sup>18</sup>

14. Gregg Peppin wrote the campaign flyer at issue (Ex. 1) and conducted the research on which it is based. Mr. Peppin is the executive assistant to Minnesota House Majority Leader Erik Paulson. Prior to this position, he worked as the assistant to Speaker of the House Steve Sviggum. When the legislature is not in session, Mr. Peppin takes a leave from that position and works as the Executive Director for the House Republican Campaign Committee (HRCC). The HRCC is the campaign arm of the House Republican Caucus.<sup>19</sup>

15. In preparing the written copy for the campaign flyer, Mr. Peppin researched the bills introduced by Representative Hortman, her voting record, public statements, press releases, 2004 campaign material, web site, and news items. Mr. Peppin reviewed HF 2310 in preparing the copy, and he understood that the effect of the bill as written would have been to decrease property taxes in the Anoka-Hennepin and Osseo school districts in 47B, but would likely have increased property taxes statewide. He then drafted the written material for the campaign flyer and e-mailed it to Kevin Watterson, who designed the flyer. Mr. Watterson is also employed by HRCC.<sup>20</sup>

16. Once Mr. Watterson had finished designing the campaign flyer, he sent a copy of the flyer to Mr. Peppin for his approval. Mr. Peppin reviewed and approved the flyer and sent it on Benjamin Golnik, the Executive Director of the Republican Party of Minnesota for his approval.<sup>21</sup>

17. Mr. Golnik received a copy of the final version of the campaign flyer in an email from Mr. Peppin. Before approving the flyer, Mr. Golnik “fact-checked” it by reviewing data from the Department of Education and the Governor’s recommended budget.<sup>22</sup> The flyer was also reviewed by the Republican Party of Minnesota’s communications director and research director. Following his review, Mr. Golnik approved the campaign flyer for distribution.<sup>23</sup>

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<sup>16</sup> Footnote 5 in Ex. 1 citing “Hortman 2004 campaign literature.” (Emphasis in original).

<sup>17</sup> Footnote 6 in Ex. 1 stating “As Chief Author. See [www.house.mn/members/47B](http://www.house.mn/members/47B).”

<sup>18</sup> Ex. 1 (Emphasis in original).

<sup>19</sup> Testimony of Peppin.

<sup>20</sup> Testimony of Peppin and Golnik.

<sup>21</sup> Testimony of Peppin.

<sup>22</sup> Exs. 5 and 6.

<sup>23</sup> Testimony of Golnik and Peppin.

18. The Republican Party of Minnesota paid for the cost of printing and mailing the flyers. A disclaimer on the flyer states that it was paid for by the Republican Party of Minnesota.<sup>24</sup> The flyers were mailed only to voters in District 47B. Approximately 8,000 flyers were mailed.<sup>25</sup>

19. The Complainant filed this Complaint with the Office of Administrative Hearings on September 22, 2006.

20. Based upon the foregoing Findings of Fact, the panel makes the following:

### **CONCLUSIONS**

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.06, subd. 1, provides, in part: “A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination ... of ... campaign material with respect to the personal or political character or acts of a candidate ... that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office ..., that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.”

3. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.06, relating to false campaign material, is clear and convincing evidence.<sup>26</sup>

4. The Complainant has failed to demonstrate that the Respondent violated Minn. Stat. § 211B.06 because the evidence is insufficient to prove by clear and convincing evidence that the statement that Representative Hortman “failed to introduce even one bill [to reduce homeowner property taxes]” is false and that Respondent knew it was false or subjectively knew that it was probably false.<sup>27</sup>

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

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<sup>24</sup> Ex. 1.

<sup>25</sup> Testimony of Golnik.

<sup>26</sup> Minn. Stat. § 211B.32, subd. 4.

<sup>27</sup> See *Riley v. Jankowski*, No. A051125 (Minn. App. Apr. 26, 2006).

## ORDER

IT IS ORDERED:

That the Complaint in this matter is DISMISSED.

Dated: October 16, 2006

/s/ Beverly Jones Heydinger  
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BEVERLY JONES HEYDINGER  
Presiding Administrative Law Judge

/s/ Bruce H. Johnson  
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BRUCE H. JOHNSON  
Administrative Law Judge

## MEMORANDUM

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. In order to be found to have violated this section, a person must intentionally participate in the preparation or dissemination of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.<sup>28</sup> Based on this standard, the Complainant must show by clear and convincing evidence that the Respondent either published the challenged statement knowing the statement was false or published with reckless disregard for its truth or falsity. In *Riley v. Jankowski*,<sup>29</sup> the Minnesota Court of Appeals interpreted the “reckless disregard” standard stated in Minn. Stat. § 211B.06, subd. 1, as requiring clear and convincing evidence that Respondent made the statement while subjectively believing that the statement was probably false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of

<sup>28</sup> *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

<sup>29</sup> 713 N.W.2d 379 (Minn. Ct. App. 2006), *review denied* 2006 Minn. LEXIS 493 (Minn. July 19, 2006).

candidates for office or to prevent deductions and arguments from their official conduct that are unfavorable to them. It does not reach criticism which is merely unfair or unjust. It does reach false statements of specific facts.<sup>30</sup>

Here, the record established that Representative Hortman was the Chief Author of a bill (HF 2310) that, if enacted as written, would have raised property taxes statewide but would have lowered them for her legislative district. Because the campaign flyer was sent only to voters in District 47B and uses terms such as “we” and “us,” it implies that Representative Hortman did not introduce any bill as Chief Author that would have lowered property taxes for residents of District 47B, when in fact HF 2310 would have lowered property taxes for the district’s residents. As such, the statement in the flyer is intentionally misleading. Although intentionally misleading, it is true that Representative Hortman was not the Chief Author of a bill that would have the overall effect of lowering property taxes. Hence, the statement is not clearly false.

The evidence established that the proposed increase in caps for excess levy referenda would not have affected the taxpayers within the two school districts in House District 47B. Representative Hortman testified that the only reason she had included the provision increasing the caps in her bill was to attract the support of legislators whose constituents favored a cap increase. In other words, the campaign material in question criticizes Representative Hortman for doing what her constituents elected her to do—that is, engage in the process of legislative compromise in ways that further the interests of her own constituents. What seems particularly insincere here is that the Republican Party suggests that Representative Hortman should not be re-elected for engaging in the same process of political compromise that its own House majority leader Paulsen engaged in during the same legislative session.

Representative Hortman also claims that she did not “promise” to reduce property taxes. Her campaign literature does not state a “promise” to do so. However, a fair reading of the cited campaign literature shows that lowering property taxes was one part of her plan for economic development in her district. Whether that constitutes a “promise” is an opinion, not a statement of fact.

It is clear from Mr. Peppin’s testimony that he understood the effect the statement that Ms. Hortman did not introduce even one bill to reduce homeowner property taxes would have on the voters and the likelihood that readers were receiving incomplete information. However, it is not a violation to include only the partial picture. Sadly, the practice is common in campaign literature and not confined to one political party. Telling half the truth is particularly galling here because Mr. Peppin claimed that his purpose in creating the brochure was not to defeat Representative Hortman, but to “educate” the voters. As an effort to educate, it deserves a failing grade.

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<sup>30</sup> *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

It was clearly the Respondent's intent to imply that Representative Hortman has done nothing to help lower property taxes for homeowners in her district, when in fact she authored a bill that would have reduced property taxes in her district. However, Minn. Stat. § 211B.06 is directed against false statements of fact and not false implications. The majority of the panel concludes that the evidence is insufficient to prove by clear and convincing evidence that the statement at issue in the campaign flyer is false. Accordingly, the Complaint is dismissed.

B.J.H., B.H.J.

### DISSENT

I respectfully dissent from the conclusion of the majority of the panel that the statement "Even though she promised to 'reduce homeowner property taxes' Melissa Hortman failed to introduce even one bill to do so" is not a false statement. This flyer was prepared specifically for the residents of House District 47B. It was sent only to residents of House District 47B. To the extent Hortman made any promise to work toward a reduction of property taxes, it was made to the residents of House District 47B. The language in the flyer ("We said yes to Melissa Hortman") further reinforces the message that Melissa Hortman failed to introduce any legislation to reduce property taxes for residents of 47B, which is what I believe the average voter in 47B would understand the flyer to say. This is a false statement.<sup>31</sup>

If the statement is false, there is no question that the Respondent knew it was false and communicated it anyway. Mr. Peppin testified that he knew the effect of HF 2310 was to "pay for a reduction in property taxes in her district by increasing property taxes statewide." The Republican Party of Minnesota accepted Peppin's copy for the flyer, paid for it to be printed, and distributed 8,000 copies into House District 47B. I would find that the Respondent violated Minn. Stat. section 211B.06 and would assess a penalty based on the violation.

/s/ Kathleen D. Sheehy by BJH  
KATHLEEN D. SHEEHY  
Administrative Law Judge

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<sup>31</sup> *Jadwin v. Minneapolis Star and Tribune*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974) (statement that must be proved false is not necessarily the literal phrase published but rather what a reasonable reader would have understood the author to have said). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).